85-2015

NO.

Supreme Court, U.S.
FILED
JUN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner

v.

HARCON BARGE COMPANY, INC., D&G BOAT RENTALS, INC. AND THE M/V CHARLES D, TIDEWATER-VENICE, INC. AND THE M/V IBERVILLE, ARTHUR SMITH CORPORATION AND THE M/V I.C. HOSKINS, AND CANAL BARGE COMPANY AND THE M/V MARIAN HAGESTAD

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lawrence J. Ernst
J. Warren Gardner, Jr.
Christovich & Kearney
1900 American Bank Building
New Orleans, Louisiana 70130
(504) 561-5700

Counsel for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

29pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner applies for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit for review of the following procedural questions:

I. Does the Fifth Circuit's "bright-line" rule conflict with the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, create waste and confusion and arbitraily denies petitioner of its right to appeal?

II. Is a motion to amend the judgment to reflect an offer of judgment pursuant to Federal Rule of Civil Procedure 68 properly made under Rule 60 which does not affect a pending notice of appeal?

III. Does a motion to amend the judgment in one of four consolidated cases affect the rights of petitioner to appeal in the other cases?

IV. Did the court err in failing to invoke Rule 2 of the Federal Rules of Appellate Procedure to allow petitioner's appeal to go forward?

LIST OF PARTIES

The parties to the Fifth Circuit proceedings were Southern Pacific Transportation Company, the Government of the United States, Harcon Barge Company, Inc., D&G Boat Rentals, Inc. and the Motor Vessel Charles D. Arthur Smith Corporation and Tidewater-Venice, Inc. and the Motor Vessel Iberville, Canal Barge Company and the Motor Vessel Marian Hagestad.

TABLE OF CONTENTS

Question Presented for Review.....i
List of Parties.....ii
Table of Contents.....iii
Table of Authorities.....iv
Decisions Below.....1
Jurisdiction.....2
Statutory Provisions.....2
Statement of the Case.....9
Argument.....13
Conclusion.....20
Certificate of Service.....22

TABLE OF AUTHORITIES

Page

Alfred Dunhill of London v. Republic of China,
425 U.S. 682, 96 S.Ct. 1854 (1976).....18

Forman v. Davis,
371 U.S. 178, 181, 83 S.Ct. 227, 230 (1962).....20

Glick v. White Motor Company,
317 F.Supp 42 (E.D.Pa. 1970).....17

Griggs v. Provident Consumer Discount Company,
459 U.S. 56, 103 S.Ct. 400 (1982).....13,14

Harcon Barge Company v. D&G Boat Rentals, Inc.
476 F.2d 278 (5th Cir. 1984).....2,11

Harcon Barge Company v. D&G Boat Rentals, Inc.,
760 F.2d 86 (5th Cir. 1985).....2,12

Harcon Barge Company v. D&G Boat Rentals, Inc.
__F.2d__, No. 82-4584, slip opinion, (5th Cir. 1986).....2

Hegger v. Green,
91 F.R.D. 595 (E.D.N.Y. 1981).....17

Jones v. Anderson-Tully Company,
722 F.2d 211 (5th Cir. 1984).....17

Liberty Mutual Insurance Company v. E.E.O.C.,
691 F.2d 438 (9th Cir. 1982).....16

Matter of Cobb,
750 F.2d 477 (5th Cir. 1985).....18

Miller v. Leavenwrith-Jefferson Electric Cooperative, Inc.,
653 F.2d 1378 (10th Cir. 1981).....16

Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.
63 F.R.D. 607 (E.D.N.Y. 1974).....16

Warner v. City of Bay St. Louis,
526 F.2d 1211 (5th Cir. 1976).....17

Waters v. Heublein,
485 F.Supp. 110 (N.D.Cal. 1979).....16

TABLE OF AUTHORITIES (continued)

Page

West Virginia Oil and Gas Company v. George Breece Lumber Company,
213 F.2d 702 (5th Cir. 1954).....17

White v. New Hampshire Department of Employment Sec.,
455 U.S. 455, 102 S.Ct. 1152 (1982).....16

Willie v. Continental Oil Company, et al,
476 F.2d 1041 (5th Cir. 1984).....11,12

STATUTES

Fed.R.Civ.P.42.....2,19
Fed.R.Civ.P.59.....3,11,12,13,14,15,16,18
Fed.R.Civ.P.60.....4,11,12,13,14,15,16,17,18
Fed.R.Civ.P.68.....6,10,16
Fed.R.App.P.2.....7,19,20
Fed.R.App.P.4.....7,11,12,13,14,15

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner

v.

HARCON BARGE COMPANY, INC., D&G BOAT RENTALS, INC. AND THE M/V CHARLES D, TIDEWATER-VENICE, INC. AND THE M/V IBERVILLE, ARTHUR SMITH CORPORATION AND THE M/V I.C. HOSKINS, AND CANAL BARGE COMPANY AND THE M/V MARIAN HAGESTAD

Respondents

PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

This case has had a complicated procedural history, which is the subject of this petition. Decisions entered are as follows:

1. Opinion and judgment of United States District Court for the Western District of Louisiana dated December 8, 1982, unreported.
2. Amended judgment of the United States District Court for the Western District of Louisiana dated January 25, 1983, unreported.
3. Order of Court of Appeals denying motions to dismiss appeal dated June 22, 1983, unreported.
4. Order of Court of Appeals denying motions for reconsideration of motion to dismiss appeal dated September 14, 1983, unreported.

5. *Harcon Barge Company v. D&G Boat Rentals, Inc.*, 746 F.2d 278 (5th Cir 1984)
6. *Harcon Barge Company v. D&G Boat Rentals, Inc.*, 760 F.2d 86 (5th Cir. 1985) (ordering rehearing en banc)
7. *Harcon Barge Company v. D&G Boat Rentals, Inc.*, __F.2d__, No. 82-4584, slip opinion, (5th Cir. 1986) (en Banc.)

JURISDICTION

Jurisdiction of the trial court was based upon the admiralty and maritime jurisdiction of the court, 28 U.S.C. § 1333. The decision in question by an en banc panel of the United States Court of Appeals for the Fifth Circuit was entered on March 12, 1986.

This court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

This petition raised issues concerning the following provisions of the Federal Rules of Civil Procedure and Federal Rules of Appellant Procedure:

1. Fed.R.Civ.P.42

Rule 42. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials

will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States. (As amended Feb. 28, 1966, eff. July 1, 1966.)

2. Fed.R.Civ.P.59

Rule 59. New Trials; Amendment of Judgment

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period

not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.
(As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

3. Fed. R. Civ.P.60

Rule 60. Relief from Judgment or Order
(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as

the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On Motion an upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the

court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.
(As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

4. Fed.R.Civ.P.68

Rule 68. Offer of Judgment
At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accured. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissable except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement

of hearings to determine amount or extent of liability. (As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

5.Fed.R.App.P.2

Rule 2. Suspension of Rules

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

6. Fed.R.App.P.4

Rule 4. Appeal as of Right - When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expries.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance

with Rules 58 and 79 (a) of the Federal Rules of Civil Procedure.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.
(Amended Apr. 30, 1979, effective Aug. 1, 1979.)

STATEMENT OF THE CASE

The present appeal arises out of four collisions by vessels to the Southern Pacific Transportation Company (Southern Pacific) railroad bridge over the Atchafalaya

River at Berwick, Louisiana. The four collisions occurred in a four week period beginning April 7, 1979. The four collisions gave rise to five lawsuits which were consolidated for trial before the United States District Court for the Western District of Louisiana. In four cases, Southern Pacific, as plaintiff, sought recovery from four vessels and their respective owners for damages to the railroad bridge. Named as defendants in these lawsuits were the M/V Charles D and D&G Boat Rentals, Inc., (D&G), the M/V Iberville and Tidewater-Venice, Inc. (Tidewater), the M/V I.C. Hoskins and Arthur Smith Corporation and the M/V Marian Hagestad and Canal Barge Company (Canal) In the other case, Southern Pacific was named as a defendant by Harcon Barge Company, the barge owner, for damages caused to its barge by the design of the bridge which the barge struck.

After a lengthy trial, the court issued its judgment on December 8, 1982 which was mailed to all counsel that day. (Appendix A.) A docket notation, "DKT-D", was made in one of the consolidated cases on December 14, 1982. Southern Pacific filed its notice of appeal to the United States Fifth Circuit Court of Appeals on December 21, 1982 contestiing awards made by the judgment as to each claim in the consolidated cases.(Appendix B.)

On that day, Tidewater filed a "motion to amend the judgment" to avail itself of an offer of judgment made prior to trial pursuant to Fed.R.Civ.P.68. (Appendix C.) The motion did not stipulate the rule under which it was brought. D&G and Canal later filed notices of cross appeal on January 7, 1983 and January 17, 1983 respectively. On January 25, 1983, the court granted Tidewater's Motion to Amend the Judgment to reflect its earlier offer of judgment. (Appendix D.) On January 31, 1983, a notation was made on the court's docket, "DKT-D".

On June 3, 1983, all appellees and appellees/cross appellants brought Motions to Dismiss Southern Pacific's appeal contending that Tidewater's Motion to Amend the Judgment was made pursuant to Fed.R.Civ.P.59(e) and the granting of Tidewater's Motion to Amend the Judgment nullified Southern Pacific's Notice of Appeal according to Rule 4(a)(4) of the Federal Rules of Appellate Procedure. Movers contended that failure to refile a Notice of Appeal from an Amended Judgment barred Southern Pacific's appeal. Southern Pacific contended that the motion was properly brought under Fed.R.Civ.P.60 which did not affect the status of its appeal.

On June 22, 1983, the Court of Appeals unanimously denied the Motions to Dismiss the appeal. (Appendix E.) Motions for reconsideration were filed and these motions were also denied by the Court on October 14, 1983. (Appendix F.)

The case was argued on July 25, 1984 and then submiitted for decision on the merits. By letter of August 25, 1985, the Court again requested briefing on the issue of timeliness of the appeal and the issue as to whether or not a judgment or amended judgment had actually been entered. The decision, *Harcon Barge Company v. D&G Boat Rentals, et al*, 476 F.2d 278 (5th Cir. 1984), was rendered on November 12, 1984. (Appendix G.) The panel held, as a preliminary matter, that Tidewater's motion to amend the judgment was a Rule 59(e) motion which nullified Southern Pacific's notice of appeal. The Court did not reach the merits of the case. The appeal was dismissed for lack of jurisdiction.

On December 9, 1984, Southern Pacific filed a suggestion for rehearing en banc based on the conflict in the decisions of the Fifth Circuit which arose following the Court's opinion in *Willie v. Continental Oil Company, et al*,

476 F.2d 1041, (5th Cir. 1984). On April 23, 1985, in *Harcon Barge v. D&G Boat Rentals, Inc.*, 760 F.2d 86 (5th Cir. 1985), the Court ordered the case be reheard en banc in a consolidated hearing with *Willie v. Continental Oil Company, et al.* (Appendix H.)

The en banc hearing was ordered to resolve the conflict concerning whether or not a post-judgment motion to amend the judgment pursuant to a Rule 68 offer of judgment was properly brought under Rule 59(e) or Rule 60(b)(1). The en banc opinion was rendered on March 12, 1986. (Appendix I.) That Court did not address the specific questions of whether the Tidewater motion was made pursuant to Rule 59(e) or Rule 60(b). Instead, it promolgated the "bright-line" rule and held that *any* post-judgment motion to alter or amend the judgment served within ten days after the entry of judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), is within the unrestricted scope of Rule 59(e) and must, however designated by the movant, be considered as a Rule 59(e) motion for the purposes of Fed.R. App.P.4.(a)(4). If, on the other hand, the motion asked for some relief other than the correction of a purely clerical error and is served after the ten day limit, then Rule 60(b) governs its timeliness and effect.

Based upon the "bright-line" rule, the Court characterized the Tidewater motion to amend the judgment as a Rule 59(e) motion, which nullified Southern Pacific's previously filed notice of appeal. Petitioner's appeal was therefore dismissed.

This Writ of Certiorari is sought by petitioner to this High Court to remedy the injustice created by the Court of Appeal's analysis of post-judgment motions and its adoption of the "bright-line" rule which has arbitrarily denied petitioner of its right to appeal the trial court decision

in this matter.

ARGUMENT

I. DOES THE FIFTH CIRCUIT'S "BRIGHT-LINE" RULE CONFLICT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF APPELLATE PROCEDURE, CREATE WASTE AND CONFUSION AND ARBITRAILY DENIES PETITIONER OF ITS RIGHT TO APPEAL?

The en banc panel dismissed petitioner's appeal because, under its "bright-line" rule, the Tidewater motion to amend the judgment to reflect an offer of judgment, *must* be characterized as a Rule 59(e) motion which nullifies petitioner's previously filed notice of appeal. The Court of Appeals did not examine the substance of Tidewater's motion nor did it determine if Tidewater's motion was made pursuant to Rule 59(e) or Rule 60(b)(1). Instead, it held that, although different under the Federal Rules of Civil Procedure, motions under Rule 59(e) and 60(b) provide similar relief - change in the judgment. These should therefore be treated similarly for purposes of Rule 4(a)(4) of the Federal Rules of Appellate Procedure. Because motions under Rule 59(e) must be served within 10 days of entry of judgment, while motions under Rule 60(b) be make within one year of that date, the court found that a uniform test was needed to signal when a new notice of appeal was necessary. The Court therefore enacted its "bright-line" rule as a necessary "complement" to this Court's decision in *Griggs v. Provident Consumer Discount Company,* 459 U.S. 56, 103 S.Ct. 400 (1982).

The "bright-line" rule is totally arbitrary. Any post-trial motion served within 10 days of the entry of judgment is either a 59(e) motion or a Rule 60(a) motion. The rule

completely rejects the possibility of a motion filed under Rule 60(b) within 10 days of entry of judgment.

Surely the Court of Appeals went beyond reason. Fed.R.App.P.4 sets forth precisely the types of post-trial motions which nullify a pending notice of appeal. These are post-trial motions made under Rules 50(b), 52(b), and 59 of the Federal Rules of Civil Procedure. A Rule 60 motion has no effect on a pending notice of appeal under Rule 4(a)(4).

There is no basis for the court's decision. In *Griggs*, the court examined the interaction between Fed.R.App.P. 4(a)(4) and Rule 59(e). That decision did not deal with the application of Rule 60. There is no reason to "compliment" that opinion with a rule that judicially eradicates Fed.R.Civ.P. 60(b). It is not within the province of the Court of Appeal to deny the possibility that such a motion might exist.

The "bright-line" rule creates waste, expands the instances in which multiple notices of appeal will be required, and creates a multitude of problems. How, for example, would one consider a motion for extension of time to file a motion to alter or amend the judgment. Obviously, such a motion does not fall within the scope of Rule 60(a) to correct clerical error and, based upon the court's logic, after every such motion, served within ten days of the entry of judgment, a new notice of appeal would be required.

Timeliness, under the "bright-line" rule is based upon the date the motion is served and not filed. Thus, analogizing the "bright-line" rule to the rules regarding service of a Rule 59(e) motion, any post-judgment motion to alter or amend the judgment with a certificate of service dated within 10 days of entry of judgment is potentially a Rule 59(e) motion which is capable of nullifying a pending notice of appeal. Litigants must thus maintain a constant lookout. Any motion served within ten days of entry of

judgment which does not correct a clerical error is capable of nullifying an appeal.

The Fifth Circuit's finding that to construe a motion as a Rule 60(b) motion in order to preserve an appeal creates problems of filing multiple notices of appeal is totally illogical. If a Rule 60(b) motion is filed after a pending notice of appeal, it has no effect on the notice of appeal. No further notice or multiple notice would therefore be required.

There is no need to create a rule which expands the scope of Fed.R.App.P.4(a)(4) or which places different significance on a Rule 60(b) motion based on whether it is filed within 10 days of entry of judgment. It has never been the intent of the Federal Rule of Appellate Procedure to include a Rule 60(b) motion in the scope of Rule 4(a)(4) nor the intent of the Federal Rules of Civil Procedure to elimiinate the possibility of a Rule 60(b) motion within 10 days of entry of judgment. The "bright-line" rule is not only in conflict with the spirit of these rules but creates waste and confusion and in particular, arbitrarily denies petitioner of its right to appeal. This Court should reject this rule.

II. IS A MOTION TO AMEND THE JUDGMENT TO REFLECT AN OFFER OF JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 68 PROPERLY MADE UNDER RULE 60, WHICH DOES NOT AFFECT A PENDIING NOTICE OF APPEAL?

In its first opinion the panel characterized Tidewater's motion as a Rule 59(e) motion. On rehearing, that part of the panel opinion was vacated. This issue was left unaddressed in light of the Court's adoption of the "bright-line" rule. Petitioner submits the Tidewater amendment was properly made under Rule 60.

On December 21, 1981, Tidewater filed a motion to amend the judgment. The motion did not stipulate the rule

under which Tidewater was proceeding to amend the judgment. The motion sought to avail Tidewater of the provisions of Rule 68 of the Federal Rules of Civil Procedure. Rule 68 provides that if a plaintiff rejects a defendant's settlement offer perfected in accordance with that rule and if "the judgment finally obtained by the offeree is no more favorable than the offer", the plaintiff *must* pay costs incurred after making the offer. (Emphasis added.)

Rule 68 relief is merely a way for a party to limit its costs. Rule 68 relief allows the court no discretion in its application. *Waters v. Heublein*, 485 F.Supp. 110 (N.D.Cal. 1979); *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974). By its very terms, Tidewater's motion to amend the judgment did not question the substantive correctness of the judgment or call upon the court to reconsider its fact findings or conclusions of law. Tidewater sought only to limit the costs which it would have to pay because of the judgment. The amendment did not affect the substantive rights of any of the parties to the litigation. It merely limited the costs which one defendant, Tidewater, would have to pay in the consolidated action. The motion was not within the contemplation of Rule 59(e). It dealt not with the underlying judgment, but a matter ancillary to the judgment. *White v. New Hampshire Department of Employment Sec.*, 455 U.S. 445, 102 S.Ct. 1162 (1982); *Miller v. Leavenwrith-Jefferson Electric Cooperative, Inc.*, 653 F.2d 1378 (10th Cir. 1981).

A post-trial motion to award, deny, or otherwise consider costs is properly made pursuant to Federal Rule of Civil Procedures 60(b)(1). *Liberty Mutual Insurance Company v. E.E.O.C.*, 691 F.2d 438 (9th Cir. 1982). Such a motion does not alter or amend the judgment but merely seeks what is due because of the judgment. *White v. New Hampshire Department of Employment Sec., supra.* Tidewater's motion to amend the judgment is thus maintainable under

Rule 60(b)(1). This rule permits correction of a judgment which is erroneous and caused by mistake, inadvertence, surprise or an excusable neglect. *West Virginia Oil and Gas Company v. George Breece Lumber Company*, 213 F.2d 702 (5th Cir. 1954); *Jones v. Anderson-Tully Company, 722 F.2d 211 (5th Cir. 1984); Warner v. City of Bay St. Louis*, 526 F.2d 1211 (5th Cir. 1976).

Additionally, there is authority for finding that the Tidewater motioin was properly filed under Rule 60(a). An amendment to the judgment which seeks to correct a matter of right is properly made pursuant to Federal Rule of Civil Procedure 60(a). *Glick v. White Motor Company*, 317 F.Supp 42 (E.D.Pa. 1970). In *Glick*, the court held that an amendment to a judgment to allow prejudgment interest in a diversity case was governed by Rule 60(a) where the judgment failed to authorize interest as allowed by state law. Examining the statute, the court found its provisions mandatory. It allowed no judicial discretion. Accordingly, the court concluded that the motion to amend the judgment to allow prejudgment interest was properly made under Rule 60(a).

In *Hegger v. Green*, 91 F.R.D. 595 (E.D.N.Y. 1981) the court found that an amendment to the judgment to add an award of prejudgment interest was made pursuant to Rule 60(a). The amendment allowed "a mechanical ascertainment of interest" and was found to be a "ministerial oversight", remedial as a clerical error under Rule 60(a). *Hegger* at 598. The court noted that Rule 60(a) is not limited to errors in the clerk's office. "The term 'clerical mistake' does not mean that it must be made by the clerk... It is the type of mistake that does not involve legal decision or judgment by an attorney". *Hegger* at 597. Tidewater was entitled to limit its costs as a matter of right. The amended judgment recited only the operative facts in the record. An amendment to correct such type of oversight is

made by Rule 60(a). *Matter of Cobb,* 750 F.2d 477 (5th Cir. 1985).

The en banc opinion does not deny that Tidewater's motion could be brought under Rule 60(b)(1), but only that under the "bright-line" rule, the motion must be characterized as a 59(e) motion. The Court of Appeals erred as a matter of law. The motion is properly characterized under Rule 60(b)(1) and also under Rule 60(a). In either case, the motion would not affect the status of Southern Pacific's appeal.

III. DOES A MOTION TO AMEND THE JUDGMENT IN ONE OF FOUR CONSOLIDATED CASES AFFECT THE RIGHTS OF PETITIONER TO APPEAL IN THE OTHER CASES?

The five cases before the court were consolidated for purposes of trial. Although one judgment was rendered, it specified the various liabilities of each particular defendant. (Appendix A.) Even if the Tidewater motion to amend the judgment were found to be a Rule 59(e) motion, the amended judgment limited only the costs which one party, Tidewater, would have to pay. (Appendix B.) It did not affect the other parties. The Court of Appeals erred in fiinding that actions by Tidewater could prejudice petitioner's appellate rights against the other parties to the consolidated action. There is no authority for this reasoning.

Parties may not by consolidation be deprived of some substantive right available to them in an individual suit once consolidated. "The actions [do] not loose their separate identities for purposes of consolidation. *Alfred Dunhill of London v. Republic of China,* 425 U.S. 682, 735, 96 S.Ct. 1854 1880 (1976). Surely, if by consolidation, Southern Pacific's appellate rights regarding all parties

other than Tidewater are affected by Tidewater's motion, then consolidation has deprived petitioner of its precious right of appeal. There is no authority for the Court's conclusion nor was it within the spirit of Fed.R.Civ.P.42.

IV. DID THE COURT ERR IN FAIILING TO INVOKE RULE 2 OF THE FEDERAL RULES OF APPELLATE PROCEDURE TO ALLOW PETITIONER'S APPEAL TO GO FORWARD?

Rule 2 of the Federal Rules of Appellate Procedure provides that for good cause "a Court of Appeals may, except where provided in Rule 26(a), suspend the requirements or provisions in a particular case". Accordiing to the Advisory Committee Notes, the Rule "contains the general suthorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result".

If petitioner's notice of appeal was defective, then certainly there exists no better case for application of Fed.R.App.P.2, which would allow petitioners to proceed to the merits. No party has been prejudiced by petitioner's action in this case. Southern Pacific initially filed a timely notice of appeal. Both the court and opposing parties were notified of the intent to appeal. D&G and Canal both filed cross appeals to Southern Pacific's appeal. There was never a doubt of petitioner's intent to appeal.

The case has been fraught with technical uncertainties. The Court of Appeals could not determine, initially, whether or not any judgment had in fact been entered either from the original judgment or amended judgment. The motion filed by Tidewater was never designated under any particular rule. Surely, at the very least, there are strong arguments supporting characterization of

Tidewater's motion to amend the judgment under Rule 60.

To dismiss this appeal and prevent Southern Pacific from having its case addressed on the merits flies in the face of this Court's declaration that it is "too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for a decision to be avoided on the basis of such mere technicalities". *Forman v. Davis,* 371 U.S. 178, 181, 83 S.Ct. 227, 230 (1962). To do so would place form over substance and deny petitioner of one of its most precious rights.

The Court of Appeals has the power to suspend application of its rules. It erred in not using its powers under Rule 2 to allow petitioner's appeal to go forward.

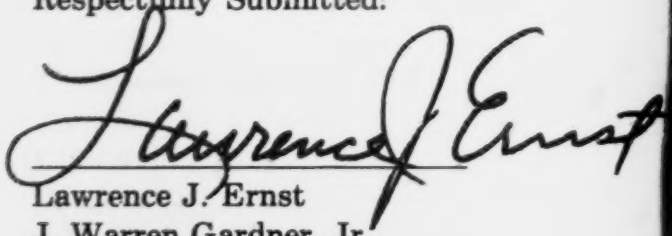
CONCLUSION

The Fifth Circuit's decision in *Harcon Barge Co., Inc.,* raises serious questions concerning appellate procedure and jurisdiction which have yet to be addressed by this High Court. The Fifth Circuit's adoption of the "bright-line" rule contradicts the spirit and purpose of both the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure. It creates waste and confusion and most importantly, has arbitrarily denied petitioner of its right to appeal.

The Fifth Circuit's error in adopting the "bright-line" rule as well as that court's erroneous analysis of post-judgment motions and their effect on consolidated actions have created a grave injustice which merit review and reversal by this court.

For these reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted:

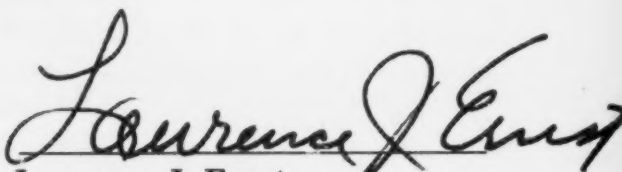


Lawrence J. Ernst
J. Warren Gardner, Jr.
Christovich & Kearney
1900 American Bank Building
New Orleans, Louisiana 70130
(504) 561-5700
Attorneys for Petitioner
Southern Pacific Transportation
Company

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been mailed by U.S. Mail to all counsel of record, this 9th day of June, 1986.

New Orleans, Louisiana.



Lawrence J. Ernst
J. Warren Gardner, Jr.